

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**AMERIFIRST FINANCIAL, INC.**

**and**

**Case 28-CA-156620**

**KELLI GONZALEZ, an Individual**

**GENERAL COUNSEL’S MOTION TO STRIKE  
EXTRA-RECORD EVIDENCE FROM RESPONDENT’S BRIEFS**

Counsel for the General Counsel respectfully moves for the National Labor Relations Board (the Board) to strike extra-record evidence incorporated and cited in Respondent’s Opening Brief and Answering Brief in this matter.

This case was transferred to the Board pursuant to a Board Order granting a Joint Motion and Stipulations of Facts submitted to the Board by all parties. In its Opening Brief and Answering Brief, Respondent incorporates and cites facts not included in the Stipulation of Facts. Specifically, in footnote 1 of its Opening Brief, Respondent states:

Since January 15, 2016, when the parties filed their joint motion to have the Board hear this matter, AmeriFirst has revised its Employee Handbook. Its Dispute Resolution Program no longer maintains the provisions in 5(a) and (e), above [the Consultation and Negotiation and Confidentiality provisions]. Moreover, the provision in 5(d), above [the Administrative Actions provision], has been revised to state only the following: “Administrative Actions. Nothing in this Agreement shall preclude you from: (i) exercising your rights under Section 7 of the National Labor Relations Act, if any; or, (ii) filing an administrative claim relating to your employment with state or federal government or administrative agencies, or participating in any investigation of the same.” A copy of the revised Dispute Resolution Program is provided at Exhibit 1.

Attached to Respondent’s Opening Brief as Exhibit 1 is the document Respondent characterizes as its revised Dispute Resolution Program. Respondent refers to the revisions to its Dispute

Resolution Program throughout its Opening Brief and Answering Brief in arguing that because the rescinded or revised provisions are no longer in effect, no relief is necessary.

It is well established that portions of briefs incorporating extra-record evidence may be stricken and disregarded. See, e.g., *The Fund for the Public Interest*, 360 NLRB No. 110, slip op. at p. 1 n.2 (May 13, 2014); *Steelworkers Local Union 193-G (PPG Industries)*, 356 NLRB No. 127, slip op. at p. 1 n.2 (Mar. 31, 2011); *Kimtruss Corp.*, 305 NLRB 710, 710 n.2 (1991). Striking and disregarding Respondent's citations to extra-record evidence is necessary in this case not only because the Board cannot rely on it, but also because the consideration of such evidence would deprive the General Counsel and the Charging Party of due process, including the opportunity to object to introduction of the evidence, cross-examine witnesses about it, or offer evidence to rebut it.

Moreover, even if the extra-record evidence were not stricken, it should have no bearing on the remedy in this case. Respondent admittedly maintained the provisions at issue during the 6 months prior to filing and service of the charge, and the Stipulation of Facts, together with the extra-record evidence Respondent includes in its Opening Brief and Answering Brief, is not sufficient to meet Respondent's burden of establishing that it has effectively repudiated the provisions at issue. In particular, Respondent has not presented evidence showing that it effectively communicated to affected employees that it was implementing the revised Dispute Resolution Program, that the previous versions of the Dispute Resolution Program have been rescinded and will no longer be given any force or effect, or that they are free to engage in protected concerted activities and file unfair labor practice charges with the Board. See *Mastec Advanced Technologies*, 357 NLRB No. 17, slip op. at 9, 20 (2011), citing *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), and *Claremont Resort & Spa*, 344 NLRB 832 (2005).

Accordingly, Counsel for the General Counsel respectfully moves for the Board to strike all extra-record evidence from Respondent's Opening Brief and Answering Brief, including footnote 1 of its Opening Brief, Exhibit 1 to its Opening Brief, and all references to the revisions it allegedly made to its Dispute Resolution Program after the filing of the Joint Motion and Stipulation of Facts.

Dated at Phoenix, Arizona, this 26<sup>th</sup> day of April, 2016.

Respectfully submitted,

/s/ Stefanie J. Parker

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of **GENERAL COUNSEL'S MOTION TO STRIKE EXTRA-RECORD EVIDENCE FROM RESPONDENT'S BRIEFS** in Case 28-CA-156620 was served by E-Gov, E-Filing, and E-mail on this 26<sup>th</sup> day of April, 2016, on the following:

### **Via E-Filing:**

The Honorable Gary Shinnors  
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Respectfully submitted,

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